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No. 94-1039

In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN and the CITY COUNCIL OF ASPEN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Colorado Supreme Court err in ruling that the Equal Protection Clause of the Fourteenth Amendment prohibits the implementation of a voter-approved amendment to the Colorado Constitution that mandates the exclusion of a specifically identified and targeted minority from participation in the normal processes of government on an equal basis with other citizens.

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OPINIONS BELOW

The pertinent opinions of the Colorado Supreme Court are reported at 882 P.2d 1335 (Colo. 1994) (on the merits) and 854 P.2d 1270 (Colo. 1993) (preliminary injunction). (See Pet. App. B and D, respectively.) The pertinent opinions of the trial court are not reported, but may be found at Pet. App. C (on the merits) and E (preliminary injunction), respectively.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article II, § 30b of the Colorado Constitution provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

STATEMENT OF THE CASE

Proceedings Below

On November 17, 1977, the City of Aspen adopted a comprehensive anti-discrimination ordinance prohibiting invidious discrimination in employment, housing and public accommodations within the city, including discrimination based upon affectional or sexual orientation. Municipal Code of the City of Aspen § 13-98 (1977). On November 3, 1992, a majority of the Colorado electorate passed a statewide ballot proposal commonly known as "Amendment 2"[1] which was intended to amend the Colorado Constitution so as to effect an immediate repeal of § 13-98 of the Aspen Municipal Code and all other state and local legislative, regulatory and administrative anti-discrimination measures protecting homosexual, lesbian, or bisexual citizens from invidious discriminatory acts. In addition to nullifying existing anti-discrimination protections, Amendment 2 also had the objective of stripping all elected officials and levels of government of their discretion and authority to adopt or enforce future legislation or regulations prohibiting discrimination against homosexual, lesbian and bisexual individuals. In furtherance of that objective, Amendment 2 mandated a fundamental change in the traditional political processes historically utilized by citizens to initiate legislative measures in their interest so as to foreclose the local or statewide adoption of legislation protecting homosexuals and bisexuals from discrimination in employment, housing and public accommodations absent the consent of a majority of the

[1] Article II, § 30b, Colorado Constitution.

Colorado electorate by way of the passage of an amendment to the Colorado Constitution.

On November 12, 1992, Aspen joined with several other parties in initiating litigation in state court challenging the constitutional validity of Amendment 2. Claiming that Amendment 2 violated guarantees to the equal protection of the law as provided under the Fourteenth Amendment to the Constitution of the United States, plaintiffs moved the court for preliminary injunctive relief enjoining the effectiveness of the measure. After a four-day hearing, the trial court entered an order on January 15, 1993 preliminarily enjoining the enforcement of Amendment 2, concluding that the measure infringed upon a fundamental constitutional right and was likely unconstitutional. On January 19, 1993, the petitioners herein appealed the trial court's order to the Colorado Supreme Court, which affirmed on July 19, 1993. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*"Evans I"*) (Pet. App. D). In upholding the injunction, the court found that the right of citizens to participate in the processes of government is a core democratic value and that the opportunity to participate on an equal basis in such processes constituted a fundamental constitutional right guaranteed by the Equal Protection Clause. *Evans I* (Pet. App. at D-9 and D-10). The court further held that inasmuch as Amendment 2 mandated a restructuring of the political and governmental processes for the purpose of imposing singular disadvantages and burdens upon homosexuals, lesbians and bisexuals, the amendment, to a reasonable probability, infringed upon the right of citizens to participate equally in the political process and must, therefore, be subject to strict judicial scrutiny. *Evans*

I (Pet. App. at D-25 to 27). The matter was thereafter remanded to the district court for a trial on the merits, including a determination on whether Amendment 2 was narrowly tailored in support of a legitimate and compelling governmental interest. Petitioners sought *certiorari* review of the Colorado Supreme Court's decision before this Court, which review was denied on November 1, 1993. *Romer v. Evans*, No. 93-453, ___U.S.___, 114 S.Ct. 419 (1993).

Trial was conducted before the state district court on October 12-22, 1993. The evidence and record as developed before the court at the earlier hearing on preliminary injunctive relief was incorporated into the trial record. On December 13, 1993, the trial court entered a written order permanently enjoining the enforcement of Amendment 2, ruling that the measure was not narrowly tailored in support of a legitimate and compelling state interest and that it violated guarantees to the equal protection of the law as provided under the Constitution of the United States. On February 4, 1994, petitioners sought review of the district court's decision before the Colorado Supreme Court which, after a *de novo* review, affirmed the trial court's analysis and findings and the entry of the permanent injunction. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (*"Evans II"*) (Pet. App. B).

Statement of Facts

As described in the testimony of the originators and promoters of the measure at trial, Amendment 2 was initiated to fend off alleged militant gay aggression within Colorado and prevent state and local government

from providing homosexuals "protected class status". (Pet. App. C-7) Pursuant thereto, Amendment 2 was designed and specifically intended to dilute and defeat the legal and political ability of homosexuals, lesbians and bisexuals to protect themselves against invidious discrimination. (XV:842-45, 853)

Petitioners offered six "compelling state interests" in support of Amendment 2 at trial: 1) deterring factionalism; 2) preserving the integrity of the State's political functions; 3) preserving the ability of the State to remedy discrimination against suspect classes; 4) preventing governmental interference with personal, familial and religious privacy; 5) preventing government from subsidizing the political objectives of a special interest group; and 6) promoting the physical and psychological well-being of children. The trial court rejected all of the petitioners' arguments on these points finding that: 1) deterring factionalism as defined by the petitioners amounted to suppressing political debate and, thus, did not constitute a compelling state interest (Pet. App. C-6); 2) the petitioners failed to demonstrate that the preservation of the State's political functions constituted a compelling interest and, likewise, failed to present any persuasive evidence demonstrating that militant gay aggression existed in Colorado or that the State's political functions were threatened, or that absent Amendment 2 homosexuals and bisexuals would be declared a suspect class and afforded protections based upon that classification (Pet. App. C-8); 3) the petitioners failed to factually support their claim that Amendment 2 would help remedy discrimination against suspect classes by preserving fiscal resources and/or that preserving fiscal resources

constituted a compelling interest (Pet. App. C-9 to 10); 4) the petitioners failed to establish a definition for personal privacy and how Amendment 2 would allegedly protect such right and, similarly, failed to demonstrate that Amendment 2 was narrowly tailored in support of protecting religious freedom and familial privacy (Pet. App. C-12 to 13); 5) no authority existed or was offered by petitioners illustrating that foreclosing government from subsidizing the political objectives of a special interest group constituted a compelling governmental interest (Pet. App. C-13); and 6) that Amendment 2 was not logically related to and did not serve the alleged compelling interest of protecting children (Pet. App. C-13 to 14). On appeal before the state supreme court, petitioners abandoned their previously argued sixth interest in favor of a new and different interest, to wit, that Amendment 2 promoted the interest of allowing people to establish public social and moral norms, including such norms as heterosexual marriages and families and the condemnation of homosexuals and bisexuals as immoral. After a *de novo* review of the several different interests as put forward by the petitioners, both on an individual and aggregate bases, the Colorado Supreme Court affirmed the trial court's ruling in all respects.

Contrary to the assertion as set forth in the petition for *certiorari* (Pet. at 14), the Colorado Supreme Court did not rule that legal distinctions or classifications based upon sexual orientation trigger heightened scrutiny or protection under the Equal Protection Clause. As explained by the court in its initial decision affirming the issuance of the preliminary injunction, it was not the nature of the classification(s) drawn by Amendment 2

that necessitated the court to review the measure under a more stringent level of scrutiny, rather it was the nature of the right invaded and diminished by Amendment 2 that mandated such scrutiny. *Evans I* (Pet. App. D-21 to 23).

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE COLORADO SUPREME COURT DOES NOT CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

The ruling of the Colorado Supreme Court as challenged by petitioners herein rests entirely upon the prior decisions of this Court which illustrate that the right of citizens to participate on an equal basis in the processes of government is implicit and fundamental in our constitutional system and reflects a core democratic value protected by the Equal Protection Clause. *Reynolds v. Sims*, 377 U.S. 533, 529 (1964) ("each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies"); *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626 (1969) ("unjustified discrimination in determining who may participate in political affairs undermines the legitimacy of representative government"); *Gordon v. Lance*, 403 U.S. 1, 5-6 (1971) (when the State identifies and singles out a discrete and independently identifiable group for discriminatory treatment regarding the methods for obtaining access to legislative processes, a right protected by the Equal Protection Clause is implicated); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1971) ("in

decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens . . . ").[2] Consistent with this Court's precedents holding that the Equal Protection Clause applies to all citizens and not just to those who are members of "suspect" classes, *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), and given the amendment's threatened impact on the rights of the class of citizens targeted therein to participate equally in state and local governmental processes, the Colorado Supreme Court employed strict judicial scrutiny in evaluating the validity of Amendment 2. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 31-33 (1973) (test of strict judicial scrutiny required where state's laws interfere with exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution).

Having found first that Amendment 2 infringed upon a protected fundamental right by "fencing out" an independently identifiable minority from the operations of government and, secondly, that the petitioners had failed to demonstrate that the measure was narrowly tailored in support of a compelling state interest, the Colorado

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[2] While the right to vote in state elections is nowhere expressly mentioned in the Constitution, *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 664 (1966), and is not, *per se*, a constitutionally protected right, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973), it has, nonetheless, been determined to be a fundamental right given the inherent participatory nature and design of our system of representative self-government. *Reynolds v. Sims, supra.*

Supreme Court ruled that the amendment unconstitutionally imposed unique and special burdens on the rights and ability of a singularly targeted minority to participate equally in the State's political and governmental processes and permanently enjoined its effectiveness. *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) ("State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size"); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 469-70 (1982) (political majority may not manipulate government processes so as to allocate power in nonneutral fashion and impose special and unequal structural burdens upon minority interests); *Gordon v. Lance, supra* at 7 ("fencing out" independently identifiable group from political process violative of equal protection).

The petitioners' request that the Court accept *certiorari* review in this matter on the basis that the decision of the Colorado Supreme Court conflicts with the decision of this Court in *James v. Valtierra*, 402 U.S. 137 (1971) is both unfounded and inaccurate. Unlike the measure before the court below, *Valtierra* involved a state constitutional provision which required voter approval prior to the expenditure of public funds for low rent housing, a provision quite different from Amendment 2 which was drafted and intended to cripple the political participatory rights of an "independently identifiable group".[3] Furthermore, the *Valtierra* decision did not address or rely upon

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[3] In upholding the state constitutional provision at issue in *Valtierra*, the Court found that it "ensures that all the people of a community will have a voice in a decision which may lead to

the *Hunter* doctrine requiring the allocation of political power according to "neutral principles". *Compare, Hunter, supra* at 393-95 (Harlan, J., concurring) and *Washington, supra* at 470. *Valtierra* was decided essentially upon principles relevant to suspect classifications, not fundamental rights. Hence, contrary to the petitioners' assertions of a conflict between the holdings in *Evans* and the prior decisions of this Court, a proper reading of the ruling shows that it reflects a reasoned implementation and enforcement by the Colorado Supreme Court of the controlling constitutional principles laid down in *Hunter, Washington* and *Gordon*. This Court need not revisit those principles.

II. THE DECISION OF THE COLORADO SUPREME COURT DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW OR CONFLICT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS.

Petitioners assert that in the *Evans* decision, the Colorado Supreme Court in effect determined that sexual orientation defines an "identifiable group" warranting special constitutional protections equivalent to those afforded suspect and/or quasi-suspect classes, including

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large expenditures of local government funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community." (footnote omitted) *Valtierra, supra* at 143. The Court further noted that lawmaking procedures that disadvantage a particular group do not *always* deny equal protection. (emphasis added) *Id.*, at 142.

the application of strict judicial scrutiny to any governmental measure that makes distinctions on the basis of sexual orientation. According to petitioners, the application of strict judicial scrutiny to classifications drawn on the basis of sexual orientation as allegedly called for by the Colorado Supreme Court is in conflict with the decisions of every federal court of appeals that has considered the issue. (Pet. at 14-15) Respondents respectfully submit that the petitioners have mistakenly characterized the Colorado Supreme Court's ruling and that an objective reading of the decision unequivocally shows that the level of review employed by the Colorado Supreme Court in assessing the validity of Amendment 2 was not only proper, but required.

The Colorado Supreme Court reviewed the legal sufficiency of Amendment 2 under the test of strict scrutiny. Contrary to the petitioners' assertion, the application of strict scrutiny review by the court was not based upon a conclusion that sexual orientation defines a protected "identifiable group", or "because it [Amendment 2] bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." Rather, the Colorado Supreme Court employed strict scrutiny review because by expressly and exclusively singling out an independently identifiable group in a non-neutral fashion for exclusion from the normal affairs of government, Amendment 2 directly infringed upon the fundamental right as vested in *all* citizens to participate equally in the political processes that make up our system of self-government:

Prior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation. Thus, like any other member of the electorate, the political process was open to them to seek legislation or other enactments deemed beneficial in the same way it was open to all others. Were Amendment 2 in force, however, the sole political avenue by which this class could seek such protection would be through the constitutional amendment process. In short, Amendment 2, to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the United States Constitution. Amendment 2 must be subject to strict judicial scrutiny in order to determine whether it is constitutionally valid under the Equal Protection Clause. (footnote omitted) *Evans I* (Pet. App. D-27)

As demonstrated above, the Colorado Supreme Court's ruling in *Evans* does not recognize or intimate a new group or class of citizens for special protection under the Fourteenth Amendment, nor does it create or extend heightened standards of judicial review in the evaluation of government measures that draw distinctions based upon sexual orientation. Unlike the factual and legal circumstances that framed the various federal appellate court cases relied upon by the petitioners to illustrate an alleged conflict, Amendment 2 presented the court below with a measure that directly infringed upon a fundamental constitutional right. Because a fundamental right was at stake, the Colorado Supreme Court exercised strict scrutiny review. Such review was not only proper, it was mandatory. *Zablocki v. Redhail*, 434 U.S. 374, 383

(1978) (where a threatened right is of fundamental importance, a critical examination of the state interest offered in support of the challenged classification is required).

In that the Colorado Supreme Court unambiguously applied strict scrutiny review to Amendment 2 on the basis that it threatened a fundamental right and not because it mandated distinctions in the treatment of persons based upon sexual orientation, this Court need not exercise *certiorari* review in this matter so as to resolve alleged conflicts regarding the standard of judicial review to be applied to governmental classifications predicated upon sexual orientation.

III. THE DECISION OF THE COLORADO SUPREME COURT DOES NOT PRESENT SPECIAL AND IMPORTANT REASONS WARRANTING *CERTIORARI* REVIEW.

Review on *certiorari* is not a matter of right, but of discretion, and may only be granted when there are "special and important reasons" therefor. S.Ct.Rule 10.1; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) ("special and important reasons" imply problems beyond the academic or episodic). In that the Colorado Supreme Court's ruling below is founded entirely upon established constitutional principles as originally laid down by this Court, respondents respectfully submit that there exists no special or important reason for the Court to grant the petition as sought herein. While the petitioners have set out a frightening parade of horribles allegedly put into

motion by the Colorado Supreme Court's holding, petitioners' fears fundamentally arise from a basic mischaracterization of the decision and not from any error or weakness in the court's legal reasoning or conclusions. Petitioners also overstate the reach of the Colorado court's holding, for although it constitutes an important and meaningful decision, it is, nonetheless, a state and not a federal court decision addressing a state enactment and the manner in which the citizens of Colorado may amend their state constitution.[4] It does not establish controlling precedent relevant to issues or actions that may arise in other parts of the Nation. This Court should not accept the petitioners' invitation to reach out and resolve artificial or anticipated "uncertainties" allegedly spawned by the ruling below, particularly in the absence of any direct conflict between the Colorado Supreme Court's decision and the rulings of this Court or a United States court of appeals.

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[4] Article II, § 2 of the Colorado Constitution proclaims that the people of Colorado may "alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States".

CONCLUSION

For the reasons as set forth above, the petition for writ of certiorari as sought herein should be denied. Alternatively, the Court should summarily affirm the decision of the Colorado Supreme Court on the basis of *Hunter v. Erickson*, *Gordon v. Lance*, and *Washington v. Seattle School District No. 1*.

Respectfully submitted this 10th day of January, 1995.

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